

SUCCESSFUL PROSECUTION STRATEGIES WITH DIFFICULT AND UNSYMPATHETIC WITNESSES

- I. **Introduction:** There is no such thing as a perfect witness.
 - A. **Most Witnesses Have Problems:** DV cases usually present us with difficult witnesses.
 - B. **We Must Strategize Around Them:** Because difficult witnesses are the norm, we have to strategize around them.
 - C. **Why Does It Matter:** DV and sexual assault cases with difficult witnesses result in more acquittals than cases with likeable witnesses. Jurors are more
 - D. **All Victims Deserve Our Best Effort** whether or not they are cooperative.
 1. **Respect:** All victims are to be treated with respect.
 2. **Pretrial Preparation With Reluctant or Recanting Victims:** Special care should be taken with these difficult or unsympathetic victims.
 3. **Meetings:** Meet with the victim as often as you need to and as often as he will allow.
 4. **Discovery:** Share with the victim his statement and go over it with him. This includes the 911 call.
 5. **State v. Defendant:** Explain what it means that the State has brought the case, not the victim personally.
 6. **Counseling:** The victim should be made aware that, in the event of a conviction, that counseling will be mandatory.
- II. **What Kind Of Victim Am I Dealing With:** Our strategy for dealing with a difficult witness will depend on what kind of witness we are talking about:
 - A. **The Absent Victim**
 1. **Explain Absence:**
 - a. **Process Server:**
 - b. **Expert:**
 2. **Evidence-based Prosecution:** There are special considerations for prosecuting the case without calling the victim.
 - a. **Crawford Issues:**
 - i. **Hearsay Exceptions that Survive Crawford:**
 - i. **911 Call**
 - ii. **Medical Statements**
 - iii. **Present Sense Impression**
 - b. **Forfeiture by Wrongdoing**
 - B. **The Coerced Victim:** This is the person who claims to have been pressured by the police to give a statement.

- C. **The Minimizing (Reluctant) Victim:** This is the victim who will say on the stand, “He didn’t really hit me. It wasn’t really a punch. It was just an accident
- D. **The Victim With No Memory:** Some victims will claim that they have no memory of the events.
 - 1. **When Does Memory Begin To Fail:**
 - 2. **Lay Foundation For Recorded Recollection:**
 - a. **Memory Now Faded Such That Cannot Testify Fully and Accurately:**
 - b. **Once Remembered:**
 - c. **Record Made While Victim’s Memory Was Still Fresh:**
 - d. **Was Trying To Be Accurate At The Time**
 - 3. **Cannot Deny What Police Reported**
- E. **The Fed Up (Overly Cooperative) Victim:** This can be the worst type of victim to deal with, and the hardest one with which to win a conviction.
 - 1. **Allow To Vent**
 - 2. **Corroborate Past Violence**
 - 3. **Prepare The Witness**
- F. **The Victim With A Troubled Background:** Issues such as alcoholism, drug addiction, mental health problems, and prior criminal histories are common among DV and sexual assault victims.

III. General Trial Considerations For Difficult, Unsympathetic, Reluctant, and Recanting Victims: There are certain strategies to consider for every one of these cases.

- A. **Motions In Limine Regarding the Victim:**
 - 1. **Prior Suicide Attempts**
 - 2. **Prescription Medications**
 - 3. **Mental Health Problems (self-mutilation)**
 - 4. **Specific Acts of Dishonesty**
 - 5. **Alcohol Use Unrelated to Events**
 - 6. **Bad Behavior that The Defendant Knew Nothing About**
 - 7. **Sexual Activity of the Victim**
- B. **Request For A View:**
- C. **Do Not Hide From The Jury What You Know Will Happen:**
- D. **Theme—The Defendant’s Behavior:** Keep the trial focused on the defendant’s behavior.
 - 1. **Motions In Limine:** Consider motions *in limine* regarding the defendant:
 - a. **404(b) Motions**
 - b. **609 Motions:**

2. **Defendant's Character Under 404(a)(1)—Opening the Door:**

E. **Witness Order:** Do not lead off with the victim.

F. **Direct Examination:**

1. **Your Demeanor:** Non-confrontational.
2. **Order Of Events During Direct:** Save impeachment for last
3. **Establish Explanations For The Counterintuitive Behavior:**
4. **Prior Inconsistent Statements of Victim Rule 613(b)**
5. **Facts of Assault:** The most delicate decisions you will have to make are those involving what exactly you will ask about the actual assault.